

[Appearing Counsel on next page]

FILED
DISTRICT COURT OF GUAM

MAY 26 2006

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

MARY L.M. MORAN
CLERK OF COURT

JULIE BABAUTA SANTOS, *et al.*,

Petitioners,

-v-

FELIX P. CAMACHO, *et al.*

Respondents.

Civil Case No. 04-00006

**JOINT MOTION OF THE SANTOS
AND TORRES PARTIES FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT
AGREEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

[ORAL ARGUMENT REQUESTED]

CHARMAINE R. TORRES, *et al.*,

Plaintiffs,

-v-

GOVERNMENT OF GUAM, *et al.*,

Defendants.

Civil Case No. 04-00038

MARY GRACE SIMPAO, *et al.*,

Plaintiffs,

-v-

GOVERNMENT OF GUAM,

Defendant.

Civil Case No. 04-00049

-v-

FELIX P. CAMACHO, Governor of Guam,

Intervenor-Defendant.

ORIGINAL

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1 MOTION

2 On April 6, 7, and 8, 2006, the parties to these three consolidated cases participated in
3 mediation in Guam before the Hon. William J. Cahill (Ret. Judge). As a result of the mediation,
4 parties in the *Santos* and *Torres* actions reached a settlement agreement in principle, subject to
5 final documentation. By Order dated April 26, 2006, the Court gave the parties until May 26,
6 2006, to complete the documentation and submit it to the Court.

7 Accordingly, the Moving Parties¹ now jointly submit the resulting Settlement Agreement
8 concurrently herewith and respectfully move the Court for an order: (1) granting preliminary
9 approval of the Settlement Agreement; (2) setting all necessary Court dates and timetables under
10 the Settlement Agreement; (3) approving and ordering the issuance of the class notices; (4)
11 conditionally certifying the EIC settlement class, as defined in the Settlement Agreement and
12 pursuant to a separate motion to be filed shortly within the time frame provided for under the
13 Settlement Agreement; and (5) granting such other and further relief as the Court may deem just
14 and proper. Pursuant to Section II(a)(v) of the Settlement Agreement, if the Court preliminarily
15 approves the Settlement Agreement, conditionally certifies the class, and orders the issuance of
16 class notice, the Moving Parties have agreed that the previous June 14, 2004 Settlement
17 Agreement shall be mutually rescinded and of no further force or effect, and that the June 17,
18 2004 stipulated Order in the *Santos* action granting preliminary approval to that previous
19 settlement shall be vacated. Accordingly, the Moving Parties ask that upon the occurrence of
20 stated conditions, the Court enter an order vacating the June 17, 2004 stipulated Order.

21 The Moving Parties recognize the Court has issued a stay in the three cases pending
22 interlocutory appeal of Court's decision regarding disqualification of the Attorney General. *See*
23 March 16, 2006 Order. Nonetheless, the Moving Parties believe that the interlocutory appeal
24 should not preclude the Court from proceeding with approval of the instant Settlement
25

26 ¹ The Moving Parties consist of parties to the *Santos* (CV04-00006) and *Torres* (CV04-
27 00038) actions – *i.e.*, Petitioner Julie B. Santos (“Petitioner”), Interim Class Counsel Mike
28 Phillips, Esq. (“Interim Class Counsel”), Governor of Guam Felix P. Camacho (the “Governor”),
the Director of Revenue & Taxation Artemio B. Ilagan and the Director of Administration
Lourdes M. Perez (the “Directors”), Charmaine R. Torres (“Torres”), and Lujan Aguigui & Perez
LLP, counsel for Torres.

1 Agreement. The issues will be briefed and set forth in detail in the Governor of Guam's
2 forthcoming motion to lift the stay, to be filed within the next few days.²

3 This Joint Motion is based upon the accompanying memorandum of points and
4 authorities, the Declaration of Daniel M. Benjamin, the files and records in this action, and such
5 other evidence and arguments as may be presented at or before the hearing on this motion.

6 The Moving Parties request oral argument. The statement pursuant to Local Rule
7 7.1(e)(2) will be submitted regarding oral argument dates with respect to this and certain other
8 motions to be filed within the next several days. The Moving Parties will provide notice of the
9 hearing date once the Court provides a date.

10 Respectfully submitted this 26th day of May, 2006.

11
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14 Attorneys for Felix P. Camacho, Governor of
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16 By: 

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By: 

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2
26 ² Furthermore, although the Attorney General technically remains a *party* to the Torres
27 action, a motion will be filed within the next few days pursuant to the Settlement Agreement to
28 dismiss the Attorney General from the case. In the *Torres* action, the Attorney General requested
that he be dismissed as a party defendant pursuant to 26 U.S.C. § 7422(f), and the Magistrate
Judge recommended that his request be granted. See Report and Recommendations of Magistrate
Judge (CV04-00038) at 4-6 (filed Sept. 29, 2005).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Moving Parties in the *Santos* and *Torres* actions respectfully submit this Memorandum of Points and Authorities in Support of their Joint Motion for Preliminary Approval of Class Action Settlement Agreement.

In light of the disputed issues involved in this litigation concerning the liability of Guam's government to pay Earned Income Tax Credits ("EIC") to eligible Guam taxpayers since 1995, the inherent uncertainties and risks involved in further litigation, the benefits to be received and potential recovery for EIC class members pursuant to the Settlement Agreement, and the expense and burden of continued litigation, the Moving Parties agree that settlement on the terms and conditions set forth in the Settlement Agreement is fair and reasonable and in the best interests of the Moving Parties and of the Class sought to be certified.

The Moving Parties ask the Court to take the first step in the approval process – preliminary approval of the Settlement Agreement. In determining whether preliminary approval is warranted, the Court makes a "preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." *Manual for Complex Litig.* (4th) § 21.632 (2004). The Court looks to see whether the Settlement Agreement is sufficiently within the range of possible approval to justify notifying Class Members of the settlement and scheduling the final fairness hearing. *See Armstrong v. Bd. Of School Dirs.*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds*, *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). Parties may ask the Court for both class certification and settlement approval. *Manual for Complex Litig.* (4th) § 21.632. In such cases, the certification hearing and preliminary fairness evaluation can usually be combined. *Id.* If preliminary approval and certification are warranted, the Court directs the preparation of notice of the certification of the class, proposed settlement, and date of the final fairness hearing. *Id.*

As set forth in further detail in this filing, the Moving Parties submit that the Settlement Agreement satisfies the requirements for a preliminary (as well as a final) fairness evaluation by the Court. Accordingly, the Moving Parties are requesting that the Court issue an order that:

- 1 • Grants preliminary approval to the Settlement Agreement filed concurrently herewith;
- 2 • Sets all necessary Court dates and timetables under the Settlement Agreement;
- 3 • Approves and orders the issuance of the class notices provided for under the Settlement
- 4 Agreement;
- 5 • Conditionally certifies the EIC Class, as defined in the Settlement Agreement, pursuant to
- 6 this Joint Motion and a separate motion to be filed with the Court within a few days and
- 7 within the time frame provided for under the Settlement Agreement;
- 8 • Vacates the June 14, 2004 stipulated Order in the *Santos* action, upon preliminary
- 9 approval, conditional certification of the class, and approval of the issuance of class
- 10 notice, pursuant to Section II(a)(v) of the Settlement Agreement;
- 11 • Grants such other and further relief as the Court deems just and proper.

12 The Moving Parties recognize the Court has issued a stay in the three consolidated cases
13 pending interlocutory appeal of Court's decision regarding disqualification of the Attorney
14 General. *See* March 16, 2006 Order. Nonetheless, the Moving Parties believe that the
15 interlocutory appeal should not preclude the Court from proceeding with either preliminary or
16 final approval of the instant Settlement Agreement. Such issues will be briefed and set forth in
17 detail in the Governor of Guam's forthcoming motion to lift the stay, to be filed within the next
18 few days. Moreover, although the Attorney General technically remains a *party* to the Torres
19 action, a motion will be filed within the next few days pursuant to the Settlement Agreement to
20 dismiss the Attorney General from the case. In the *Torres* action, the Attorney General had
21 requested that he be dismissed as a party defendant pursuant to 26 U.S.C. § 7422(f), and the
22 Magistrate Judge recommended that his request be granted. *See* Report and Recommendations of
23 Magistrate Judge (CV04-00038) at 4-6 (filed Sept. 29, 2005).

24 **II. SUMMARY OF THE LITIGATION**

25 The Court already is familiar with the lengthy history of this litigation, initiated first with
26 the *Santos* action in February 2004, followed by the *Torres* action in August 2004, and then the
27 (non-settling) *Simpao* action in December 2004. The litigation involves the Government of
28 Guam's alleged non-payment of Earned Income Tax Credits to eligible Guam taxpayers. The

1 Court consolidated the cases for pretrial purposes in March 2006, and granted the Governor of
2 Guam's request for mediation under Local Rule 16.6. *See* Order Re: Settlement Conference
3 Pursuant to Local Rule 16.6 (March 21, 1006). The parties agreed on a mediator and engaged in
4 mediation; however, only parties to the *Santos* and *Torres* actions were able to successfully reach
5 a settlement, which then resulted in execution of the Settlement Agreement now being presented
6 to the Court.

7 Prior to the execution of the instant Settlement Agreement, two prior settlement
8 agreements were entered into in the *Santos* action, one in 2004, the other in 2005. Compared to
9 the settlement reached in the *Santos* case on June 20, 2005 (the "2005 Settlement Agreement"),
10 the instant Settlement Agreement involves parties to both the *Santos* and *Torres* actions. As
11 stated above, it was the result of mediation held in Guam over three (3) full days, from April 6-8,
12 2006, before a distinguished JAMS mediator, the Hon. William J. Cahill. The agreement enlarges
13 the putative class that will benefit from the settlement while providing enhanced benefits to the
14 putative class compared to the benefits provided for under the 2005 Settlement Agreement.

15 **III. ARGUMENT SUPPORTING PRELIMINARY APPROVAL**

16 **A. Summary of the Settlement Agreement**

17 In seeking preliminary approval of the Settlement Agreement so as to be able to proceed
18 with class notice, the Moving Parties believe that the terms of the Settlement Agreement are fair,
19 reasonable, and adequate. Further, they are aware that the Court cannot enter any final findings
20 regarding the fairness of the Settlement Agreement until after there is notice and a fairness
21 hearing occurs. *See* FRCP 23(e)(1)(C). The Moving Parties believe that the terms of the
22 Settlement Agreement largely speak for themselves; nonetheless, the parties wish to highlight
23 some of the key provisions of the Agreement and, where applicable, compare and contrast those
24 provisions with those of the 2005 Settlement Agreement:

25 **1. Definition of the EIC Class.** Compared to the EIC Class defined in the
26 2005 Settlement Agreement, the definition of the EIC Cass in the instant Settlement Agreement
27 has been expanded to include those taxpayers who actually filed an EIC claim with the
28 Government of Guam for tax year 1997 under the Guam Territorial Income Tax ("GTIT") or

1 Guam Earned Income Program (Chapter 42, 11 G.C.A.) on or before April 16, 2001, and have not
2 yet received full payment for those claims. As defined in the instant Settlement Agreement the
3 EIC Class is now defined as follows:

4 [A]ll persons who do not elect to request exclusion from the class
5 under the procedures described below [in the Settlement
6 Agreement] and: (1) were subject to the Guam Territorial Income
7 Tax ("GTIT") established in 48 U.S.C. § 1421i for tax years 1995-
8 1996 and/or 1999-2004 and would have been eligible to file
9 (whether or not they actually filed) for the EIC established in 26
10 U.S.C. § 32 (as it applied in each respective tax year) if that
11 program were applied in the Territory of Guam; and/or (2) were
12 eligible to receive an EIC credit under certain Guam territorial laws
13 for tax years 1995-1996 and/or 1999-2004 that mirrored the federal
14 EIC law (26 U.S.C. § 32), including the Guam Earned Income
15 Program (Chapter 42 of 11 G.C.A.); and/or (3) actually filed a
16 claim for the EIC with DRT for tax year 1998 under the GTIT or
17 Guam Earned Income Program (Chapter 42 of 11 G.C.A.) on or
18 before April 15, 2002, and have not yet received full payment for
19 that claim; and/or (4) actually filed a claim for the EIC with DRT
20 for tax year 1997 under the GTIT or Guam Earned Income Program
21 (Chapter 42 of 11 G.C.A.) on or before April 16, 2001 and have not
22 yet received full payment for that claim.

23 Settlement Agreement § 1(b).

24 **2. Schedule of Events.** Section II(a) of the Settlement Agreement provides
25 for the filing of certain submissions within seven (7) days of execution of the Settlement
26 Agreement. These filings include a motion to amend the pleadings to conform to the EIC Class
27 definition, motion for conditional class certification, and motion for attorneys' fees and costs.
28 Such filings will be made within the allowed time frame. Furthermore under Section II(a) the
parties have agreed that the instant Settlement Agreement amends and supersedes the 2005
Settlement Agreement. The parties have also agreed that upon preliminary approval of the instant
Settlement Agreement, conditional certification of the EIC class, and approval of the issuance of
class notice, the previous June 14, 2004 settlement agreement shall be mutually rescinded and of
no further force and effect and that the stipulated order dated June 17, 2004 granting preliminary
approval to that previous agreement shall be vacated.

Section II(b) provides a time frame ("Opt-Out Date") and the procedures through which
persons wishing to request exclusion from the EIC Class and the Settlement Agreement may do

1 so. The time frame established is no later than sixty (60) days after the completion of the Class
2 Notice period defined in Section III of the Settlement Agreement.

3 Section II(c) provides the time table in which the final Fairness Hearing shall occur as
4 well as deadlines for filing any motions to intervene, motions for final certification of the EIC
5 class, supplemental filings regarding attorneys' fees, filings regarding objections to or comments
6 in favor of the Settlement Agreement.

7 **3. Class Notice.** Section III of the Settlement Agreement deals with notice to
8 the EIC Class. Under the Settlement Agreement, in order to "achieve the best notice that is
9 reasonably practicable, the Parties have determined to engage in both individual notice and notice
10 by publication to the EIC Class." Settlement Agreement § II(a). Notice by publication shall
11 include publication in a full-newspaper advertisement reprinted twice weekly for not less than
12 four consecutive weeks in both the Pacific Daily News and the Marianas Variety. *Id.* § II(b).
13 Individual notice shall be given by mail. The taxpayers who will receive such notice will be
14 ascertained based on records compiled by the Guam Department of Revenue and Taxation in
15 compliance with the extensive procedures provided for by the Settlement Agreement. Settlement
16 Agreement §§ II(c)(i)-(vi).

17 **4. Settlement Benefits for Class Members.** The Settlement Agreement
18 provides payments to EIC class members for Tax Years 1995-2004, and requires the Government
19 of Guam to pay the EIC for tax years beyond 2004. *See generally* Settlement Agreement § IV. In
20 contrast to the 2005 Settlement Agreement, the instant Settlement Agreement provides that upon
21 preliminary approval, \$10 million from the Government's tax reserve funds will be made
22 available to pay a portion of EIC claims for tax year 1998. *Id.*, §§ V(i), VI(e)(ii). Additionally,
23 upon preliminary approval, the Government will also begin paying remaining EIC claims for tax
24 year 1997. *Id.*, § VI(e)(ii). These new provisions allow eligible Guam taxpayers to begin
25 receiving EIC benefits without further delay. The prompt processing of such claims by the
26 Department of Revenue and Taxation can occur in a relatively short time period because EIC
27 claims for those two (2) tax years are already on file with the Department of Revenue and
28 Taxation, as the Government allowed taxpayers to file for the EIC for those specific tax years

1 under the Guam Earned Income Program. Further specifics of the foregoing benefits are set forth
2 below.

3 *EIC Payments for Tax Years 1995-2004* – If the Court approves the
4 Settlement Agreement, amounts will be paid to EIC class members for tax years 1995-2004.
5 Although class members will not receive interest on their claims, a substantial amount -- up to
6 \$90 million – will be made available for all EIC claims for tax years 1995-1996 and 1998-2004.
7 *Id.*, § IV(a). All outstanding EIC claims for tax years 1997 constitute an additional amount
8 outside of the \$90 million and will be paid pursuant to the terms of the Settlement Agreement.
9 *See, e.g., id.*, § IV(d). Funding for the \$90 million amount will be obtained by devoting at least
10 15% of any amounts that are placed into the Government of Guam’s tax refund reserve funds,
11 which are the funds used to pay general tax refunds (*see* Settlement Agreement § V(a)). Funding
12 for payment of 1997 claims will be obtained from a reserved amount currently in the Government
13 of Guam’s tax reserve funds. *Id.*, § V(h).

14 For tax years 1995, 1996, 1999, and 2000 (claims for which there is an
15 arguable risk of a time bar if litigated), the Government has agreed to pay up to \$15 million for all
16 EIC claims for those years. *Id.*, § IV(a)(ii). The amount will be divided proportionally among
17 each claimant found eligible by DRT (applying the requirements of 26 U.S.C. § 32 as it applied in
18 each applicable year) based on the total combined value of their claim or claims for those years.
19 For tax years 1998 and 1997, there does not exist as great a risk of a time bar because the
20 Government allowed the filing of EIC claims for those years. Accordingly, the Government will
21 make available up to \$15 million for tax year 1998, and will pay remaining claims for tax year
22 1997. As noted above, processing of payments for those tax years will commence immediately
23 upon preliminary approval of the Settlement Agreement. For tax years 2001-2004, up to \$15
24 million will be made available to pay claims for each of those years. *Id.*, §§ IV(a)(iii)-(vi). The
25 Settlement Agreement also contains certain “roll-over” provisions in which any remaining
26 amounts in a particular year will be rolled-over to fund payments for certain other years. *E.g.,*
27 *id.*, §§ IV(a)(i)(3), -(ii)(1), -(ii)(3), -(iii)(1), -(iii)(3). Payments for tax years other than 1997 and
28 1998, will not occur until final approval of the Settlement Agreement and until all claims for

1 those two years are paid pursuant to the terms of the Settlement Agreement. *Id.*, §§ VI(e)(iii)-
2 (iv).

3 *EIC Payments for Tax Years Beyond 2004 – The Settlement Agreement*
4 provides for full implementation of the EIC beginning with tax year 2005 for all qualifying
5 taxpayers (*see* Settlement Agreement § IV(d)).

6 **5. Funding.** Funding for the Settlement Agreement benefits will be made by
7 reserving a minimum of 15% of each amount set aside or earmarked by the Government or
8 Legislature for income tax refunds and placed into either the Income Tax Reserve Fund or the
9 Income Tax Refund Efficient Payment Trust Fund. Settlement Agreement § V. And in order to
10 assure the class that such funds are being set aside, the Guam Department of Administration
11 (“DOA”) will provide monthly reports. *Id.*, § V(b)(ii).

12 By providing funding mechanisms for each expenditure under the Settlement Agreement,
13 the Agreement addresses concerns regarding the Illegal Expenditure Act (5 G.C.A. § 22401) that
14 had caused, in part, opposition to the previous settlement agreement of June 14, 2004 (*see id.*, §
15 V(c)). However, the Settlement Agreement also provides the flexibility for the Governor to
16 utilize other funding sources to satisfy the Government’s obligations under the Settlement
17 Agreement, as permitted by law. *Id.*, § V(d). Notably, the Agreement leaves the Respondents free
18 to pursue federal reimbursement of the EIC, while providing the class with a final resolution and
19 payment of their claims now (*see* Settlement Agreement § X(e)).

20 **6. Claims Administration.** Section 6 of the Settlement Agreement deals
21 with the administration of EIC claims. Despite creating a class action, the Settlement Agreement
22 avoids imposing an undue burden on the Court or the Government by utilizing the existing
23 structures to process tax claims (*see* Settlement Agreement § VI(a)). The Settlement Agreement
24 uses the EIC claim forms created pursuant to Executive Order 2005-001 and otherwise tracks
25 Executive Order 2005-001 in terms of claims procedures (*see* Settlement Agreement § VI(b))—
26 the same forms and procedures that recently were upheld by the District Court of Guam in the
27 Order dated June 16, 2005 in *Simpao, et al. vs. Govt. of Guam*, Dist. of Guam Case No. CV04-
28 00049.

1 **7. Setting of Court Dates and Issuance of Class Notice.** Because this is a
2 class action settlement, the execution of the Settlement Agreement requires that the Court
3 establish a number of Court dates and timetables. These are as follows:

- 4 • The date by which the “Class Notice Period” defined in Section III(d) of the
5 Settlement Agreement will be completed.
- 6 • The “Opt-Out Date” under Section II(b)(i) of the Settlement Agreement.
- 7 • The date by which any motions for intervention are to be filed and served under
8 Section II(c)(i) of the Settlement Agreement.
- 9 • The date by which the parties to the Settlement Agreement shall file a joint motion
10 for an Order of Approval and Final Judgment, and a proposed form of judgment,
11 under Section II(c)(ii) of the Settlement Agreement.
- 12 • The date by which the motion for final certification of the class under Section
13 II(c)(iii) of the Settlement Agreement shall be filed.
- 14 • The date by which any objection or comment on the Settlement Agreement must
15 be filed and served, and the date by which any responses shall be filed, under
16 Section III(c)(vi) of the Settlement Agreement.
- 17 • The dates for any additional filings, oppositions, or replies regarding attorneys’
18 fees and costs under Section II(c)(iv)-(vi) of the Settlement Agreement.
- 19 • The date for the “Fairness Hearing” as that term is defined in Section II(c)(i) of the
20 Settlement Agreement.

21 Once these dates are set, the Moving Parties will amend the draft form of class notice,
22 which is an exhibit to the Settlement Agreement. Along with inserting the dates into the class
23 notice, the Parties also will insert a brief description of Class Counsel’s motion for attorneys’ fees
24 and costs. They will then submit the draft notice for the Court’s approval so that the Court can
25 authorize and order the publication and mailing of this notice pursuant to Section III of the
26 Settlement Agreement. The parties also request that the Court approve the additional notice to be
27 issued upon payment of the \$10 million for 1998 claims, and payments for remaining 1997
28 claims. Settlement Agreement §§ V(e)(i)(4), -(ii)(3), and Exh. “D.”

1 The proposed method of notice complies with Fed. R. Civ. P. 23 and the requirements of
2 due process. *See* Fed. R. Civ. P. 23; ; *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th
3 Cir. 1993), *cert. denied sub nom Reilley v. Tucson Elec. Power Co.*, 512 U.S. 1220 (1994). Under
4 the Settlement Agreement, in order to “achieve the best notice that is reasonably practicable, the
5 Parties have determined to engage in both individual notice and notice by publication to the EIC
6 Class.” Settlement Agreement § II(a). Notice by publication shall include publication in a full-
7 newspaper advertisement reprinted twice weekly for not less than four consecutive weeks in both
8 the Pacific Daily News and the Marianas Variety. *Id.* § II(b). Individual notice shall be given by
9 mail. The taxpayers who will receive such notice will be ascertained based on records compiled
10 by the Guam Department of Revenue and Taxation in compliance with the extensive procedures
11 provided for by the Settlement Agreement. Settlement Agreement §§ II(c)(i)-(vi).

12 **B. The Standards for Preliminary Approval**

13 Preliminary approval of a class action settlement agreement does not require the Court to
14 make a final determination that the settlement is fair, reasonable, and adequate. Rather, that
15 decision is made only at the final approval stage, after notice of the settlement has been given to
16 the class members and they have had an opportunity to express their views of the settlement or to
17 exclude themselves from the settlement. *See 5 James Wm. Moore, Moore’s Fed. Practice*
18 *§ 23.83[1] (3d ed. 2001).*

19 Thus, when a Court views a settlement for preliminary approval, it determines whether
20 there is a likelihood it could approve the settlement before conducting a full fairness hearing.
21 William W. Schwarzer *et al.*, *Cal. Practice Guide: Fed. Civ. Proc. Before Trial* § 10:818. In
22 presenting the settlement for preliminary approval, the settling parties will usually submit briefs
23 and supporting documents to the court along with the proposed settlement, arguing that the
24 proposal is fair and should be tentatively approved. *Id.*, § 10:819. The court will examine the
25 submitted material and determine whether the proposed settlement seems fair on its face and
26 worth submitting to class members. *Id.*, § 10-821. Preliminary approval should be granted if the
27 settlement reveals no obvious deficiencies or grounds to doubt its fairness and appears to fall
28 within the range of possible approval. *See Manual for Complex Litig.* § 30.41 (3d ed. 1995).

1 Here the terms of the Settlement Agreement satisfy the standards for preliminary
2 approval. There are no obvious deficiencies with the agreement and no grounds to doubt its
3 fairness; the agreement falls within the range of possible approval.

4 **C. Settlement of Class Actions is Favored**

5 As a matter of public policy, settlement of litigation is highly favored in the law. *See Util.*
6 *Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 443 (9th Cir. 1989). The principle
7 applies with particular force where, as here, settlement involves class action lawsuits. *See*
8 *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied sub nom*
9 *Byrd v. Civil Serv. Comm'n*, 459 U.S. 1217 (1983); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d
10 943, 950 (9th Cir. 1976); *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 284 (D. Colo.
11 1997). In this instance, settlement would resolve not one, but two of the class action cases
12 involving the EIC, without the necessity, time, and expense of further protracted litigation.

13 **D. The Settlement Agreement Resulted from Arm's-Length Negotiations**

14 There is an initial presumption that a proposed settlement agreement is fair and reasonable
15 when it is the result of arm's-length negotiations. *See Williams v. Vukovich*, 720 F.2d 909, 922-
16 923 (6th Cir. 1983) ("The court should defer to the judgment of experienced counsel who has
17 completely evaluated the strength of his proofs"); *In re Inter-Op Hip Prosthesis Liabl. Litig.*, 204
18 F.R.D. 330, 351 (N.D. Ohio 2001) ("when a settlement is the result of extensive negotiations by
19 experienced counsel, the Court should presume it is fair").

20 Here, the proposed settlement is the product of arm's-length negotiations. The origin of
21 negotiations for some of the core terms of the agreement began in 2005 in connection with
22 settlement of the *Santos* action during that period. After the Court consolidated the actions,
23 including the *Torres* action, the parties engaged in extensive mediation in April 2006 in Guam
24 before an experienced JAMS mediator, the Hon. William J. Cahill, a retired jurist. The 2006
25 mediation resulted in an agreement that expanded the EIC class definition, incorporated
26 settlement of an additional case (the *Torres* action), and resulted in enhanced EIC benefits for the
27 expanded class including ultimate payment of all remaining EIC claims for tax year 1997, and
28

1 immediate payment (upon preliminary approval) of millions of dollars for a portion of 1998 and
2 1997 EIC claims.

3 **E. The Settlement Agreement Is Fair, Reasonable, and Adequate, and Falls**
4 **Within the Range Justifying Preliminary Approval**

5 Under the Settlement Agreement, the Respondents have agreed to make available a
6 substantial sum of money (\$90+ million) to compensate eligible Guam taxpayers for EIC claims
7 from 1995-2004. Furthermore, EIC claims beginning with tax year 2005 will be paid henceforth
8 on the same terms as they would be normally processed and paid, so that the risk of subsequent
9 litigation regarding future EIC claims is significantly mitigated or altogether eliminated. Given
10 the present financial condition and substantial obligations of the Government of Guam, the
11 amounts to be paid under the Settlement Agreement are significant, and represent a fair
12 compromise in light of the risks, costs, and delay associated with the prosecution of complex
13 cases, particularly cases against a government entity. Even if the cases were to proceed to
14 litigation and a judgment were obtained at trial against the Government and Respondents, the
15 recovery might be of no greater utility to class members, and might be substantially less valuable,
16 than the proposed settlement which establishes an immediate mechanism for processing and
17 payment of claims so that Guam's working poor can begin receiving the financial assistance that
18 the EIC was intended to provide for them.

19 **F. The Class Should be Preliminarily Certified for Settlement Purposes**

20 Parties may present a case for both class certification and preliminary approval of a
21 settlement agreement, where a class has not been previously certified by the court. *Manual for*
22 *Complex Litig. (4th)* § 21.632. The Petitioner and Plaintiff in the *Santos* and *Torres* actions will
23 submit a joint motion for conditional certification of EIC settlement class within the time frame
24 provided for under the Section II of the Settlement Agreement. The prerequisites for a class
25 action under the Federal Rules of Civil Procedure have been satisfied for purposes of settlement.

26 **IV. CONCLUSION**

27 For the reasons stated herein and in other forthcoming filings to be made pursuant to the
28 Settlement Agreement, the Moving Parties respectfully request that the Court (1) grant
preliminary approval of the Settlement Agreement; (2) set all required Court dates and timetables

1 under the Settlement Agreement; (3) approve the issuance of the required class notices; (4)
2 conditionally certify the EIC class as defined in the Settlement Agreement for settlement
3 purposes; (4) vacate the June 17, 2004 stipulated Order in the *Santos* action, upon preliminary
4 approval, conditional certification, and approval of the issuance class notice; and (5) grant such
5 other and further relief as the Court deems just and proper.
6

7 Respectfully submitted this 26th day of May, 2006.

8
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